Kentucky Law Journal

Volume 68 | Issue 4 Article 5

1980

The Rational Basis Standard of Equal Protection Review of Ordinary Legislative Classifications

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THE RATIONAL BASIS STANDARD FOR EQUAL PROTECTION REVIEW OF ORDINARY LEGISLATIVE CLASSIFICATIONS

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INTRODUCTION

According to the Supreme Court, the equal protection clause requires that courts examine classifications in ordinary social and economic legislation to determine whether they are "rationally related to furthering a legitimate state interest."[1] Whether courts in fact test the generality of legislative classifications under such a rational basis standard and whether, in our democratic society, such a role is an appropriate one for courts are the questions examined in this essay.

In order to address these questions it is first necessary to put them into perspective. Hence, this essay will begin with a short, simplistic discussion of the role of judicial review of legislation, highlighting the special problems posed by this re-

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This article was completed in October, 1979, and therefore developments after that date have not been taken into account. The reader's attention is called to the extensive literature relating to the role of the courts in applying the Constitution which has appeared since then. Among the most important contributions are the following:

J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST (1980); Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049 (1979); Perry, *Modern Equal Protection: A Conceptualization and Appraisal, Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

[1] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976). This particular formulation of the standard is utilized frequently by the Court. *See, e.g.*, Vance v. Bradley, 440 U.S. 1, 17 (1979); Friedman v. Rogers, 440 U.S. 1, 17, *reh. denied*, 441 U.S. 917 (1979). In this essay no distinctions will be drawn between review of classifications in federal statutes under the fifth amendment. The Court itself now appears to be treating the cases identically. *See, e.g.*, Vance v. Bradley, 440 U.S. at 94 n.1.

view under the general language of the equal protection clause. This will be followed by a description of the rhetoric and results of Supreme Court cases involving the rational basis standard and the impact of those cases on the lower federal and state courts. The final section will consider the policy questions involved in deciding whether judicial review of legislative classifications under the rational basis standard is appropriate.

I. JUDICIAL REVIEW AND THE EQUAL PROTECTION CLAUSE

The equal protection clause is one of a number of clauses in the Constitution which protect persons against governmental action. The examination here will be limited to the application of such clauses as restraints upon the legislative function of federal, state, and local governments. Other aspects of judicial review, such as those involving the structure of the federal government and the division of governmental powers between state and nation, will not be considered.

A. *Specific Clauses and Judicial Review*

Many provisions of the Constitution identify particular interests which are to be given special protection against legislatively imposed burdens. The first amendment, for example, identifies a group of interests involving religion, speech, press, and assembly and provides that "Congress shall make no law . . . prohibiting . . . or abridging" them.[2] By so doing, the Constitution determines that the normal political processes by which public policies are formulated and translated into legislation shall not prevail when the result is to "prohibit" or "abridge" the interests identified in the first amendment. Ever since *Marbury v. Madison*,[3] it has been generally accepted that it is the role of the courts to make the final determination as to whether particular legislation constitutes a forbidden burden on such first amendment interests.

All of this would be quite straightforward if the process were in fact the simple one described by Chief Justice Mar-

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[2] U.S. CONST. amend. I.

[3] 5 U.S. (1 Cranch.) 137 (1803).

shall in *Marbury* as one of mere interpretation and application of constitutional words. But, of course, the analysis takes a far more complex form. The Court does not read the first amendment as invalidating all legislation which burdens religion, speech, or press. Such an interpretation would impose an intolerable limitation upon normal governmental activity. Instead, the Court inquires whether the legislation is sufficiently related to an important enough governmental interest to outweigh the burden placed on the first amendment interest. Thus the policy judgments made in the legislative process—*e.g.*, whether the interest of having a quiet atmosphere in hospitals and schools justifies prohibiting the use of soundtrucks within half-mile of such institutions—are reviewed again in the courts.[4] This process appears to be not so much one of judicial interpretation of constitutional words as one of judicial reevaluation of legislative policy judgments.

Yet this process of judicial reevaluation is the price we pay for taking constitutional guarantees seriously. The first amendment was included in the Constitution for the very purpose of protecting certain interests against the normal legislative outcomes and, therefore, burdens on those interests should require special justification. Furthermore, we have long agreed that the only way to protect those interests is to require that the special justification for legislative burdens be made in the courts.

It is important to understand the full implications of this method of enforcing constitutional guarantees. Legislation emerges from a complex process by which politically accountable representatives consider the various interests involved with respect to any particular problem and attempt to accommodate those interests in a broadly acceptable manner. When this legislation is tested in the courts, the process is quite different. The government bears the burden of convincing the courts that the particular constraint on the interest is consistent with the scope of the constitutional protection given it. In determining an issue such as whether the half-mile restriction

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[4] For a classic early case of this type, see Schneider v. New Jersey, 308 U.S. 147 (1939) (ordinance forbidding the distribution of handbills on public streets).

on sound trucks is justified by the social need for quiet in hospitals and schools, judges and lawyers[5] do not attempt to redo the legislative task, but translate the issues into legal forms. They simplify issues and reason about them. Legislative policies are hypothesized and judgments are made as to the importance of those policies and as to the relevance of the legislation at issue to those policies. The mode and style of this process is one of rational argumentation and debate quite removed from the complex process of interest accommodation which occurs in the legislatures.

The recent case of *Smith v. Daily Mail Publishing Co.*[6] illustrates the way in which this judicial process differs from the legislative process. The West Virginia legislature was faced with a proposal to prohibit the publication of the names of juvenile offenders in order to avoid the stigmatic effects therefrom and to facilitate the rehabilitation of young offenders. After hearing the arguments of interested groups, the legislature approved legislation forbidding newspapers, but not the electronic media, from publishing the names of juvenile offenders without prior court approval.[7] The result was a compromise typical of the legislative process. The advocates of the interests of juvenile offenders succeeded in persuading the legislature to place limits on publication, but the prohibition was extended only to newspapers, and judges were authorized to make exceptions.

After the legislature completed its task, a newspaper was charged with violation of the statute. It sought a writ prohibiting the trial, alleging the statute to be unconstitutional.[8] The highest court of the state agreed with the newspaper and ordered the issuance of the writ.[9] The state appealed the case to

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[5] The role of the lawyer is crucial in judicial review because the party defending a law is expected to show that the law is sufficiently related to an important enough purpose to make it valid. For a discussion of the significance of the role of counsel, see Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 213-15 (1976). For a recent acknowledgement by the Court of the key role of counsel in constitutional litigation, see Raymond Motor Transp. Inc. v. Rice, 434 U.S. 429, 447 n.25 (1978).

[6] 443 U.S. 97 (1979).

[7] W. VA. CODE § 49-7-3 (1976).

[8] Daily Mail Publishing Co. v. Smith, 248 S.E.2d 269 (W. Va. 1978).

[9] *Id.*

the Supreme Court, which affirmed.[10] What is interesting for present purposes is the way in which the Court reached its conclusion that the legislature was wrong in its determination that the interest in protecting and rehabilitating juveniles justified the restriction on first amendment interests.

The Court did not examine evidence concerning the impact of the publication of the names of juvenile offenders on the rehabilitation of such offenders. Instead, it discussed a group of cases which it said established the proposition that the state cannot prevent the publication of lawfully obtained truthful information "absent a need to further a state interest of the highest order."[11] In response to the state's contention that the need to further the rehabilitation of juvenile offenders was such a need, the Court did not examine the evidence on the subject, but referred to an earlier case[12] which arose in another state in which "similar arguments were advanced by the State to justify not permitting a criminal defendant to impeach a prosecution witness on the basis of his juvenile record."[13] In referring to that case, the Court said:

> [W]e concluded that the State's policy must be subordinated to the defendant's Sixth Amendment right of confrontation. The important rights created by the First Amendment must be considered along with the rights of defendants guaranteed by the Sixth Amendment. Therefore, the reasoning [of the earlier case] that the constitutional right must prevail over the State's interest in protecting juveniles applies with equal force here.[14]

The Court went on to add that, even if the purpose was found to be sufficient, the statute was not closely enough related to that interest because it did not forbid publication by television and radio as well as by newspapers.

The *Daily Mail* example demonstrates that the consequence of extending constitutional protection to an interest is to require legislation burdening that interest to be justified in

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[10] Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

[11] *Id.* at 103.

[12] The case the Court referred to was Davis v. Alaska, 415 U.S. 308 (1974).

[13] 443 U.S. at 104.

[14] *Id.*

two quite different forums. First, it must be justified to the legislature, which in its own way attempts to resolve competing interests. Second, it must be justified in court where lawyers and judges reason about the issues utilizing the "lawyer's skill of intelligent, conscious argumentation."[15] Thus, in *Daily Mail* the West Virginia legislation was invalidated because the Court reasoned that the issues were analogous to those in an earlier case involving another state and a burden on a different constitutionally protected interest. The Court did not consider whether either the legislative or judicial record made in the case before it, as to the factual basis for the asserted state interest, was different from that in the earlier case. Instead, a resolution of competing interests made in the first case was used as a precedent, obviating the necessity for making such a resolution in *Daily Mail.* It should be noted also that the Court referred to the "arguments" of the state in the earlier case and not to any evidence which may have been presented.[16]

This determination of important issues of public policy by lawyers and courts is not inconsistent with the basic democratic constitutional scheme under which the responsibility for determining public policy is placed primarily in the political branches. However, it is consistent only when it is limited to a small number of interests which are identified with some specificity in the Constitution. The Constitution itself mandates that final decisions as to the validity of legislation burdening such interests are not to rest with the legislatures.[17] In order to protect these interests against the political processes, it is required that burdens also be justified in the judicial forum.

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[15] Nagel, Book Review, 127 U. PA. L. REV. 1174, 1176 (1979) (review of L. TRIBE, AMERICAN CONSTITUTIONAL LAW). Nagel is referring to an approach to constitutional law advanced by Tribe and "widely shared by judges and scholars" which "assumes that constitutional law is fundamentally the application of reason to public issues; it attempts to create from the lawyer's skill of intelligent, conscious argumentation a moral charter capable of ordering almost any aspect of human conduct." *Id.*

[16] 443 U.S. at 104.

[17] Of course, the argument is neither this simple nor this conclusive. For an elaborate and useful discussion, see Ely, *Constitutional Interpretivism: Its Allure and Impossibility,* 53 IND. L.J. 399 (1978).

Of course, major problems exist in the application of even those constitutional clauses which most clearly identify the interests to be protected. The range for interpretation is wide. A look at the long line of cases involving the first amendment amply illustrates the scope of discretion left to the courts. Scholars debate such questions as how closely courts should confine themselves to the language of constitutional provisions and the discoverable intent of those who drafted them in determining their scope.[18] Yet the starting point in such cases is that the interest to be protected has been identified in the Constitution and that identification serves, at least, to describe a general area within which judicial review operates.

B. *The Equal Protection Clause*

The problem is quite different, however, when we come to constitutional clauses as general in nature as the equal protection clause.[19] What interest or interests are being accorded special protection by constitutional language to the effect that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"?[20] It can be interpreted as protecting an interest in equality, as was implied by the assertion in the early case of *Yick Wo* v. *Hopkins*,[21] that it constitutes a pledge of the protection of "equal laws."[22] Yet it cannot be a guarantee that every law shall apply equally to every person, for almost all legislation involves classifications placing special burdens on or granting special benefits to certain individuals or groups. Hence, the Supreme Court has

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[18] For a recent debate see Berger, *The Scope of Judicial Review and Walter Murphy*, 1979 WIS. L. REV. 341; Murphy, Book Review, 87 YALE L.J. 1752 (1978) (review of B. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT). Of course, it is possible to state the constitutional interests protected by even the more specific clauses at such "exalted levels of abstraction" that they no longer serve to confine the scope of judicial review. For an argument that many scholars and judges are moving in that direction, see Nagel, *supra* note 15, at 1178-84.

[19] The application of the due process clause to invalidate legislation on substantive grounds presents similar problems. However, no attempt will be made to discuss the due process cases in this essay.

[20] U.S. CONST. amend. XIV.

[21] 118 U.S. 356 (1886).

[22] *Id.* at 369.

held from the beginning that the clause "does not deny to States the power to treat different classes of persons in different ways."[23] Instead, the Court says that a "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[24] Taken literally, this approach would mean that substantially the entire output of the legislative process could be subjected to reexamination in the judicial process, a result which could be justified only by the conclusion that the fourteenth amendment was designed to totally restructure our democratic system by giving courts ultimate authority in all cases to determine the "rationality" of the laws enacted through normal political processes.

The Supreme Court, however, has evidenced great reluctance to assume the burden of examining the general output of legislatures in order to police the relevance of legislative classifications to legislative purposes. Instead, it has proceeded by delineating a small number of interests which it holds are given special protection by the equal protection clause.[25] The historical context in which the clause was adopted gave the Court a firm basis for determining that the elimination of official discrimination on account of race was a major objective of the clause.[26] Reasoning by analogy, the Court has recently held that classifications based on alienage,[27] illegitimacy,[28] and gender[29] must be specially justified,

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[23] Reed v. Reed, 404 U.S. 71, 75 (1971).

[24] *Id.* at 76, quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[25] For a fuller discussion of this process, see Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U.L. REV. 89, 93-121.

[26] In Rose v. Mitchell, 443 U.S. 545, 554-55 (1979), the Court stated:

> Discrimination on account of race was the primary evil at which the Amendments adopted after the War Between the States, including the Fourteenth Amendment, were aimed. The Equal Protection Clause was central to the Fourteenth Amendment's prohibition of discriminatory action by the State: it banned most types of purposeful discrimination by the State on the basis of race in an attempt to lift the burdens placed on the Negroes by our society.

[27] The Court began by holding that state classifications based on alienage were "suspect." Graham v. Richardson, 403 U.S. 365 (1971). Recent cases indicate some weakening of the standard of review by which alienage classifications are tested.

although there have been variations in the level of justification required. But the Court has demonstrated its reluctance to intrude too far into the legislative process by refusing to require special justification for classifications based on wealth[30] or age,[31] classifications which appear in a wide range of ordinary legislation.

In a related development, but without a similar historical basis, the Court has indicated that, in some cases, the equal protection clause requires that classifications burdening fundamental interests need special justification. This analysis has been used primarily in a long series of cases invalidating classifications in the creation of legislative districts,[32] or which set

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Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978).

[28] The Court began the process of subjecting classifications based on illegitimacy to special scrutiny in Levy v. Louisiana, 391 U.S. 68 (1968). However, the Court still has not resolved the question as to how high a burden of justification must be met by the states. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978).

[29] The Court began subjecting classifications based on gender to special scrutiny in Reed v. Reed, 404 U.S. 71 (1971). In *Reed* the Court purported to be applying the rational basis standard and did not formally recognize that it was applying a "middle-level" standard of review until Craig v. Boren, 429 U.S. 190, 197 (1976). Application of that standard is now routine. *See* Califano v. Westcott, 443 U.S. 76, 88-89 (1979).

[30] At one time it appeared that the Court was moving in the direction of making wealth a disfavored classification. In a long series of cases founded on the analysis in Griffin v. Illinois, 351 U.S. 12 (1956) and Douglas v. California, 372 U.S. 353 (1963), the Court held that states which allow appellate review of criminal convictions must provide indigent defendants with trial transcripts and appellate counsel. The Court relied upon both due process requirements of fair procedure and an equal protection idea that in criminal trials the states cannot discriminate on account of poverty. In a 1966 case invalidating a state poll tax the Court asserted that "[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966). Currently, however, the Court maintains: "[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." Maher v. Roe, 432 U.S. 464, 471 (1971). The Court also stated that cases like *Griffin* and *Douglas* "are grounded in the criminal justice system" and "do not extend to legislative classifications generally." *Id.* at 471 n.6. *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973); Dandridge v. Williams, 397 U.S. 471 (1970). In all of these cases the Court applied the rational basis standard for reviewing wealth classifications.

[31] Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

[32] *See* Reynolds v. Sims, 377 U.S. 533 (1964), and its progeny dealing with apportionment of legislative districts. For a summary of the development in this area, see Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1.

voter qualifications,[33] or limit access of candidates to the ballot.[34] Here, the Court has been engaged in filling a gap in the constitutional structure. In an early case it said: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[35] Because this "right" was not stated clearly in the Constitution, the Court construed the equal protection clause as giving it substantial protection.[36]

After taking some tentative steps in the direction of identifying other interests as so fundamental that they should be given special protection under the equal protection clause, even though not otherwise protected,[37] the Court called at least a temporary halt to this development in 1973. Only classifications burdening interests "explicitly or implicitly" accorded protection elsewhere in the Constitution require special equal protection justification.[38] As so limited, the doctrine does not significantly extend the reach of judicial review. If an interest is accorded special protection by some other clause of the Constitution, it seems to matter little whether judicial review of burdens on that interest is conducted under the rubric of the underlying constitutional clause or under the rubric of equal protection.[39]

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[33] A long line of cases beginning with Carrington v. Rash, 380 U.S. 89 (1965), culminated in the holding in Hill v. Stone, 421 U.S. 289, 297 (1975), which stated that "[t]he basic principle . . . is that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest."

[34] *See, e.g.*, Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972).

[35] Reynolds v. Sims, 377 U.S. 533, 555 (1964).

[36] For a brief discussion of the Court's doctrinal difficulties, see Barrett, *supra* note 25, at 114.

[37] Shapiro v. Thompson, 394 U.S. 618 (1969), and its progeny held that a durational residence requirement as a prerequisite for securing welfare or medical assistance could be upheld only if closely related to a compelling state interest because it burdened the constitutionally protected "right" to travel. For an argument that the cases are better understood as involving discriminations against those who have recently exercised a constitutionally protected interest in interstate migration, see Barrett, *supra* note 25, at 116-20.

[38] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

[39] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Police Dep't v. Mosley, 408

Not surprisingly, this process of deriving from the general words of the equal protection clause special protection for particular interests has been controversial. In effect the Court has been using the equal protection clause as a basis for creating special constitutional protection for certain interests based on the Court's judgment as to the importance of those interests.[40] But it is not my purpose here to pursue those arguments.[41] It is enough to note that the result of the process has been simply to add a small number of interests to those already accorded special protection by the Constitution. The additional intrusion upon the legislative process, while substantial, has been limited to a few reasonably well-defined areas.

The most difficult question, however, is that posed at the beginning of this essay. Should the equal protection clause be read to require courts to examine classifications in ordinary social and economic legislation to determine whether they "rationally" further "a legitimate state interest"?[42] What would be the consequence of requiring substantially the entire

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U.S. 92 (1972). For an argument that using the equal protection clause in lieu of relying on the underlying constitutional provision may make a difference, see Barrett, *supra* note 25, at 108-12.

[40] A similar process has been utilized by the Court in extending special protection to certain interests under the due process clause. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

[41] For an excellent general discussion of the controversy, see Ely, *supra* note 17. *See also* Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978), in which the relevant literature is surveyed.

Some attempts have been made recently to find a central theme for equal protection which will rationalize the decisions. O'Fallon asserts that the core meaning of equal protection is to ensure that persons receive "equal concern and respect of the legislature" and that the Court does and should invalidate legislation, especially of a type creating classifications burdening disadvantaged groups, which are not likely to have been accorded such "equal concern and respect." O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U.L. REV. 19, 43 (1979). Karst argues that the "substantive core . . . of the equal protection clause . . . is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member." Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977). *See also* Spece, *A Purposive Analysis of Constitutional Standards of Judicial Review and a Practical Assessment of the Constitutionality of Regulating Recombinant DNA Research*, 51 S. CAL. L. REV. 1281 (1978).

[42] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976).

output of legislatures to be validated in the courts? Is it consistent with our democratic system, which allocates policy-making to the political branches, to require legislation to meet the test of "rationality" as perceived by lawyers and judges? These questions will be considered in the last section of this essay. As a preface to such discussion, however, it is necessary to examine what the Supreme Court itself is saying and doing with reference to judicial review under the rational basis test.

II. THE SUPREME COURT AND REVIEW OF LEGISLATIVE CLASSIFICATIONS USING THE RATIONAL BASIS STANDARD

The Supreme Court in the 1970's spent increasing amounts of time addressing equal protection claims. During the sixteen terms of the Warren Court, equal protection claims were discussed in an average of five and one-half opinions per year.[43] During the ten terms of the Burger Court the average has been eighteen opinions a year with twenty-two during the 1978 term. If one looks only at cases with written opinions in which statutes were held invalid under the equal protection clause, the trend is less clear. From the 1953 through the 1961 terms no more than two statutes were invalidated under equal protection in any term. From 1962 through 1970 the range was from three to eight statutes per term. The use of equal protection to invalidate statutes reached a sudden peak in 1971 and 1972, with thirteen in 1971 and eleven in 1972. Since 1972 the range has been from one to five per term.

Most of the Court's equal protection opinions (and almost all of its holdings invalidating statutes) have dealt with interests which the Court has found to be specially protected by the equal protection clause. But in recent years the Court has accepted for review larger numbers of cases involving the application of the rational basis standard to ordinary social and economic legislation. A rough count shows that during the

[43] The statistics in this paragraph are derived from the author's own examination of the cases. The cases are not cited since any likely disputes over the classification of cases would not affect the general thrust of the statistics.

fifteen terms, 1954 through 1968, the Court wrote opinions in about twenty cases applying the rational basis standard. During the ten most recent terms, however, the Court has written opinions in some sixty cases of this kind. The trend was most marked during the 1978 term when the Court wrote opinions in twelve cases applying the rational basis standard[44] and only seven involving interests accorded some higher level of scrutiny.[45]

Should the inference be drawn from these statistics that the Court has embarked upon a serious application of the rational basis standard? Can persons dissatisfied with the outcome of the legislative process in ordinary social and economic legislation require the state to demonstrate in court that the legislative classifications are rationally related to some legitimate state purpose? In answering these questions it is necessary to distinguish between what the Court says and what it does.

A. *What the Court Says*

The Court's statements concerning the scope of review of ordinary statutory classifications, if taken at face value, suggest that genuine review is conducted. They are less clear about the scope of that review. At one extreme are cases in which the Court indicates that it is giving great deference to

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[44] Califano v. Boles, 443 U.S. 282 (1979); Barry v. Barchi, 443 U.S. 55 (1979); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); United States v. Batchelder, 442 U.S. 114 (1979); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Harrah Independent School Dist. v. Martin, 440 U.S. 194 (1979); Vance v. Bradley, 440 U.S. 93 (1979); Friedman v. Rogers, 440 U.S. 1, *reh. denied*, 441 U.S. 917 (1979); Washington v. Confederated Bands of Tribes, 439 U.S. 463, *reh. denied*, 440 U.S. 940 (1979); Corbitt v. New Jersey, 439 U.S. 212 (1978); Califano v. Aznavorian, 439 U.S. 170 (1978); Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978).

[45] Califano v. Westcott, 443 U.S. 76 (1979) (gender); Caban v. Mohammed, 441 U.S. 173 (1979) (gender); Parham v. Hughes, 441 U.S. 347 (1979); Ambach v. Norwick, 411 U.S. 68 (1979) (aliens); Orr v. Orr, 440 U.S. 268 (1979) (gender); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (access to ballot); Lalli v. Lalli, 439 U.S. 259 (1978) (legitimacy). The Court also decided three cases involving allegations of racial discrimination by administrative officials. Rose v. Mitchell, 443 U.S. 545 (1979) (jury selection); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (school segregation); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (school segregation).

the legislative process by shifting to the person attacking the statute the impossible burden of convincing the Court that no state of facts "reasonably may be conceived to justify" the classification.[46] Thus the Court says that "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[47] Occasionaly, in addition, the Court adds language like the following:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.[48]

This standard for review suggests a model in which the role of the courts is limited to examining the challengers' arguments and rejecting them because the courts can always hypothesize some legislative objective which the legislature might have thought was being served by a statute.

However, many of the modern opinions of the Court suggest on their face that a broader scope of review is being exercised, that the Court upholds legislation only when it makes an affirmative finding of rationality. Four cases from the 1978 term are illustrative. In *Califano v. Boles*[49] the Court examined the reasons asserted to justify a classification in the Social Security Act which denied mother's insurance benefits to the mother of an illegitimate child because she was never married to the wage-earner father. At the outset of its analysis, the Court stated: "Congress could reasonably conclude that a woman who has never been married to the wage earner

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[46] Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 64 (1979) (quoting Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719, 732 (1973)).

[47] Vance v. Bradley, 440 U.S. 93, 111 (1979).

[48] *Id.* at 97.

[49] 443 U.S. 282 (1979).

is far less likely to be dependent upon the wage earner at the time of his death,"[50] but it ended by saying: "In sum, we conclude that the denial of mother's insurance benefits to a woman who never married the wage earner bears a rational relation to the government's desire to ease economic privation brought on by the wage earner's death."[51] In *Holt Civic Club v. Tuscaloosa*,[52] the Court articulated the standard as being whether any state of facts could reasonably be held to justify the classification, but actually examined the justifications given for the classification and concluded that the statute "was a rational legislative response to the problems faced by the State's burgeoning cities."[53] In *Vance* v. *Bradley*,[54] the Court stated the standard of extreme deference, and then devoted most of its opinion to discussing the justifications for the statute asserted by the government, concluding that the imperfection in the classification was "rationally related to the secondary objective of legislative convenience."[55] The Court noted that all parties agreed the statute would be valid if it was " 'rationally related to furthering a legitimate state interest.' "[56] In *Barry* v. *Barchi*[57] the Court upheld a statutory classification forbidding administrative stays pending hearings after suspension of the licenses of harness racing trainers, but permitting such stays with respect to thoroughbred racing trainers. First, the Court placed the burden on the challenger to demonstrate that there was no conceivable justification for the classification, and that it "was not the State's burden to disprove by resort to 'current empirical proof,' . . . Barchi's bare assertions that thoroughbred and harness racing should be treated identically."[58] But the Court went on to state that "[i]t also seems clear to us that the procedural mechanism se-

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[50] *Id.* at 289.

[51] *Id.* at 293.

[52] 439 U.S. 60 (1978).

[53] *Id.* at 75.

[54] 440 U.S. 93 (1979).

[55] *Id.* at 109.

[56] *Id.* at 97 (quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976)).

[57] 443 U.S. 55 (1979).

[58] *Id.* at 68.

lected to mitigate the threats to the public interest arising in the harness racing context is rationally related to the achievement of that goal."[59]

The form of these opinions suggests that the Court is reexamining legislative judgments and making its own determination of reasonableness. The substantial amount of space in these opinions devoted to discussing state justifications and the ultimate affirmative conclusions of rationality, suggest that in other cases in which the state's justifications are weaker, statutes will be held invalid. The inference drawn from the form of the opinions is reinforced by the fact, noted previously, that the Court is accepting for review, and writing opinions in, increasing numbers of cases involving application of the rational basis standard.

B. *What the Court Does*

The outcome of the cases, however, suggests a different picture than does the rhetoric of the Court's opinions. For all practical purposes, persons attacking statutes under equal protection cannot expect to succeed unless they persuade the Court to categorize the statutes as involving suspect classifications or specially protected interests. If this is accomplished, the higher standard of review which accompanies those suspect classes or special interests makes success more likely. Otherwise, the results suggest that the Court is strictly applying the rule that ordinary social and economic classifications will be presumed valid with the challenger bearing the virtually undischargeable burden of showing that no state of facts reasonably could be conceived to justify the statute.

A look at the box score is instructive. I have identified some ninety cases during the past twenty-five years in which the Court has considered, in a written opinion, an equal protection challenge to a statute or ordinance which did not involve one of the suspect classifications, nor burden the electoral process, nor burden an interest held to be specially protected by some other portion of the Constitution. In only eight of these cases was the legislation invalidated. One case,

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[59] *Id.*

Morey v. Doud,[60] decided in 1957, involved an ordinary economic regulation, but the case was overruled in 1975.[61] Two of the eight cases involved civil commitment procedures which discriminated against defendants in criminal cases.[62] In another, a requirement of a double bond to appeal only forcible entry and detainer cases was invalidated in part because of its impact on the poor.[63] Another involved a statute requiring recoupment of funds paid to provide counsel for indigent defendants in criminal cases which provided a more rigorous collection mechanism than those procedures for debtors generally.[64] One invalidated a classification in a federal statute denying food stamps to any household which contained one or more members unrelated to the rest.[65] Finally, an eighth case involved a tax statute which discriminated against a foreign corporation.[66]

In making the foregoing classification, I have not included two groups of cases. First are the cases dealing with the provision of free appeals and counsel to indigent defendants in criminal cases.[67] These cases can either be categorized as a group in which the Court has recognized a special interest to be protected or, more logically, as cases in which, despite the equal protection rhetoric, the underlying objection was the procedural due process requirement of a fair trial. Second are the cases involving gender and illegitimacy, in which the Court initially asserted that it was applying the general standard of review of reasonableness, but later came to recognize

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[60] 554 U.S. 457 (1957) (exemption in a currency exchange act).

[61] New Orleans v. Dukes, 427 U.S. 297, 306 (1976).

[62] Jackson v. Indiana, 406 U.S. 715 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966).

[63] Lindsey v. Normet, 405 U.S. 56 (1972).

[64] James v. Strange, 407 U.S. 128 (1972).

[65] United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

[66] WHYY, Inc. v. Glassboro, 393 U.S. 117 (1968). This case is the latest in a series in which the Court has used equal protection to accord foreign corporations admitted to do business in a state protection similar to that accorded individual nonresidents under the privileges and immunities clause of article IV of the Constitution. *Cf.* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 n.21 (1976).

[67] See note 30 *supra* and cases cited therein for a brief summary of this category of cases. The latest case in which the Court invalidated a denial of a transcript on appeal was Mayer v. Chicago, 404 U.S. 189 (1971). The latest counsel case was Anders v. California, 386 U.S. 738 (1967).

that it was in fact categorizing these classifications as suspect and giving them a higher level of review.[68] I also have not counted cases in which the classification was identified as imposing a burden on a constitutionally protected interest, although the Court may have asserted that it was applying ordinary reasonableness standards in reaching its result.[69]

C. *Impact on Lower Federal and State Courts*

The cases in the early 1970's invalidating classifications based on gender and illegitimacy, ostensibly through the application of the rational basis standard rather than any special degree of scrutiny, suggested to litigants, lower courts, and commentators that the Supreme Court was embarking on a course of expansion of the scope of review for reasonableness. Thus, in 1972 Professor Gerald Gunther concluded from an examination of the cases in the 1971 term that "a majority of the Justices is prepared to acknowledge substantial equal protection claims on minimum rationality grounds."[70] In 1974, the Fifth Circuit noted that "whatever it may have been in the past, the rational relationship standard is relatively strict. Recent Supreme Court cases teach that the test calls for a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals."[71]

Although the Court now recognizes that it is applying a higher standard of review in gender and illegitimacy cases and has not used the rational basis test to invalidate other types of legislative classifications, the record still may be read as suggesting that the Court may be persuaded to do so in the future. The Court is granting time for full argument and opinion-writing in increasing numbers of cases making challenges under the rational basis test. In the 1978 term, for example, the Court wrote twelve opinions involving application of the general standard of review and only seven involving interests

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[68] See notes 28 and 29 *supra* for citation of these decisions.

[69] *E.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).

[70] Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 19 (1972).

[71] Dorrough v. Estelle, 497 F.2d 1007, 1011 (5th Cir. 1974), *rev'd*, 420 U.S. 534 (1975).

accorded some higher level of scrutiny.[72] The attention given to discussing the justifications for the particular statutes involved gives the impression that a statute just a little less reasonable might not have survived the review. Occasional separate opinions suggest that some members of the Court are willing to extend review in this area.[73]

This impression that the Court would invalidate a statute given the proper circumstances may account for the fact that some lower federal courts and state courts are reading the equal protection clause as permitting invalidation of clarifications in ordinary regulatory statutes under the rational basis standard. A sampling[74] of federal district court opinions during 1977 and 1978 shows cases invalidating classifications in welfare legislation,[75] invalidating classifications relating to taxation,[76] statute of limitations,[77] bonds for stay of summary eviction proceedings,[78] transfer of sports eligibility,[79] residence for tuition purposes,[80] and the defense of contributory negligence.[81] Courts of appeals[82] have invalidated a mandatory re-

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[72] See notes 44 and 45 *supra* for citation of these cases.

[73] *See, e.g.*, Califano v. Aznavorian, 439 U.S. 170, 178 (1979) (Marshall, J., and Brennan, J., concurring); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 62, 63, 70 (1973) (dissents by Justices Brennan, White, Marshall, and Douglas).

[74] The list of lower federal and state cases is not exhaustive. It was derived by having student assistants check cases in which LEXIS indicated that the term "equal protection" was used. It does not include the cases from 1977 and 1978 in which lower court holdings of invalidity have already been reversed by the Supreme Court with opinions.

[75] Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va.), *vacated*, 434 U.S. 808 (1977); Buffington v. Beal, 430 F. Supp. 1281 (W.D. Pa. 1977).

[76] Duran v. City of Tampa, 451 F. Supp. 954 (M.D. Fla. 1978); Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978); McCarthy v. Jones, 449 F. Supp. 480 (S.D. Ala. 1978); International Ass'n of Firefighters v. Sylacauga, 436 F. Supp. 482 (N.D. Ala. 1977); Image Carrier Corp. v. Beame, 430 F. Supp. 579 (S.D.N.Y.), *rev'd*, 567 F.2d 1197 (2d Cir. 1977), *cert. denied*, 440 U.S. 979 (1979).

[77] Cohn v. G. D. Searle & Co., 447 F. Supp. 903 (D.N.J. 1978).

[78] Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

[79] Walsh v. Louisiana High School Athletic Ass'n., 428 F. Supp. 1261 (E.D. La. 1977).

[80] Burke v. Rashke, 428 F. Supp. 1030 (D.N.D. 1977).

[81] Wessinger v. Southern Ry. Co., 470 F. Supp. 930 (D.S.C. 1979).

[82] Again, this list may not be exhaustive.

tirement plan for teachers,[83] a classification among ex-offenders with reference to eligibility for chauffeurs' licenses,[84] and a failure to give credit on sentence for time served prior to trial.[85]

Equal protection review under the rational basis test by the state courts has been quite rigorous in California and Florida. After reviewing the various formulations of the rational basis test, the California Supreme Court recently concluded that "[a]ll of the formulas require the court to conduct *a serious and genuine judicial inquiry* into the correspondence between the classification and the legislative goals."[86] Using this formula, the California court recently invalidated classifications of ex-offenders for the purpose of securing teacher credentials[87] and the California guest statute which limited relief for automobile accident claims.[88] In a related development, the California court concluded that classifications bearing on personal liberty require strict scrutiny, resulting in the invalidation of a series of classifications relating to criminal procedures and penalties.[89] In most of these cases, the California court insulates itself from Supreme Court review by basing its determinations of invalidity upon the California Constitution as well as, or in lieu of, the United States Constitution.[90] In 1978 alone, Florida invalidated classifications in

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[83] Gault v. Garrison, 569 F.2d 993 (7th Cir. 1977), *cert. denied,* 440 U.S. 945 (1979).

[84] Miller v. Carter, 547 F.2d 1314 (7th Cir. 1977), *aff'd mem.,* 434 U.S. 356 (1978).

[85] Matthews v. Dees, 579 F.2d 929 (5th Cir. 1978).

[86] Newland v. Board of Governors, 566 P.2d 254, 258 (Cal. 1977) (emphasis added) (quoting Dorrough v. Estelle, 497 F.2d 1007, 1011 (5th Cir. 1974), *rev'd,* 420 U.S. 534 (1975)).

[87] Newland v. Board of Governors, 566 P.2d 254 (Cal. 1977).

[88] Cooper v. Bray, 582 P.2d 604 (Cal. 1978); *see also* Monroe v. Monroe, 153 Cal. Rptr. 384 (1979).

[89] People v. Olivas, 551 P.2d 375 (Cal. 1976). For recent applications of the *Olivas* approach to invalidate classifications in criminal statutes, see *In re* Eric J., 150 Cal. Rptr. 299 (1978); *In re* Jarakian, 148 Cal. Rptr. 296 (1978); People v. Sandoval, 138 Cal. Rptr. 609 (1977).

[90] In Cooper v. Bray, 582 P.2d 604, 612 (Cal. 1978) the court ended its discussion by concluding "that the statutory classification violates the state and federal equal protection guarantees." For a discussion of the general problem see People v. Disbrow, 545 P.2d 272 (Cal. 1976); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873 (1976).

statutes regarding real estate licensing,[91] dental licensing,[92] personal property tax,[93] civil penalties for traffic violations,[94] and a statute excluding minors from billiard parlors but permitting minors to play billiards in bona fide bowling alleys.[95]

A sampling of 1978 cases from other states also shows a substantial use of the rational basis test to invalidate legislation. Georgia invalidated a zoning law provision relating to liquor licenses.[96] Pennsylvania invalidated a classification in its Sunday trading laws[97] and West Virginia invalidated a classification in the provisions regarding notices of claims for suits against municipalities.[98]

Ironically, the evidence suggests that this more expansive reading of equal protection by lower federal and state courts accounts for the increasing number of opinions by the Supreme Court involving the rational basis standard and also for the somewhat misleading form of those opinions. The Court appears to be reviewing cases of this type to reverse lower court decisions invalidating statutes for the purpose of restricting, rather than expanding, the scope of judicial review of ordinary legislation under equal protection.

During the 1978 term, for example, the Court wrote opinions in twelve cases rejecting claims made under the basic reasonableness standard.[99] In nine of these cases the court below held the statute invalid and the Supreme Court reversed. The three cases in which the lower courts held the statute valid all came to the Court on appeal and all involved claims (rejected by the Court) that the particular classification (or some other classification also in the case) should be categorized as burdening a specially protected interest: one involved a claim of gender discrimination;[100] one a claim that voting rights were

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[91] Florida Real Estate Commission v. Johnson, 362 So.2d 674 (Fla. 1978).
[92] Florida State Bd. of Dentistry v. Mick, 361 So.2d 414 (Fla. 1978).
[93] Department of Revenue v. Amrep Corp., 358 So.2d 1343 (Fla. 1978).
[94] State v. Lee, 356 So.2d 276 (Fla. 1978).
[95] Rollins v. State, 354 So.2d 61 (Fla. 1978).
[96] Bozik v. Cobb County, 242 S.E.2d 48 (Ga. 1978).
[97] Kroger Co. v. O'Hara Township, 392 A.2d 266 (Pa. 1978).
[98] Anderson v. Hinton, 242 S.E.2d 707 (W. Va. 1978).
[99] See note 44 *supra* for citation of these cases.
[100] Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).

burdened;[101] one a first amendment claim;[102] and one a sixth amendment right to counsel claim.[103] The experience during all of the past decade is similar.[104]

The fact that most of the general equal protection cases before the Court are there because the court below held the statute invalid also appears to explain the form of the opinions. At the Supreme Court level in such cases the government is discharging the burden of convincing the Court that the lower court was incorrect. Its brief will usually advance affirmative reasons in support of the rationality of the challenged statute in response to the lower court arguments against it. And since a frequent opinion style of the Supreme Court is one of advancing in some detail the arguments of the court below and then responding to them, the Court methodology appears to be one of affirmatively reviewing the reasonableness of the statute for the purpose of justifying a reversal of the court below. As a result, by the very process of limiting undue intrusion by lower courts into the legislative process in the name of equal protection, the Court may be encouraging litigants to challenge increasing numbers of statutes under equal protection and encouraging lower courts to undertake such review and invalidate legislation.

III. SHOULD THE ROLE OF COURTS IN APPLYING THE GENERAL REASONABLENESS STANDARD BE EXPANDED?

The current situation with respect to constitutional review of legislative classifications under the rational basis standard is clearly unsatisfactory. The Supreme Court rarely invalidates legislation under that standard, yet litigants are bringing more equal protection challenges to the courts. Increasingly the resources of the state and federal court systems are being devoted to processing cases in which the constitutional claim is foredoomed. Thus, the Supreme Court must utilize more of its scarce time for the purpose of reversing

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[101] Holt Civic Club v. Tuscaloosa, 439 U.S. 212 (1978).

[102] Friedman v. Rogers, 440 U.S. 194 (1979).

[103] Corbitt v. New Jersey, 439 U.S. 212 (1978).

[104] I have looked at the cases and the pattern during the entire decade and the analysis is similar to that in the 1978 term.

lower federal and state courts which have used equal protection to invalidate legislation.

The Court has two options with regard to the rational basis standard. The first is to make it very clear that challenges to legislative classifications under the rational basis standard will be rejected, except for those rare cases in which classification patently is too unreasonable to survive even the loosest standard of review. An obvious way to telegraph this message would be to summarily reverse those cases in which a lower court has applied the rational basis standard to invalidate legislation, with opinions doing no more than repeating the burden placed on the challenger and stating that it had not been met. A consistent application of the presumption of constitutionality without engaging in the exercise of detailed parsing of the statutes involved would help reduce the volume of equal protection cases involving ordinary social and economic legislation.

The second option is, in the words of the Fifth Circuit, to engage in "a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals."[105] Such a judicial inquiry would, of course, result in more legislation being held invalid under equal protection, a considerable increase in equal protection litigation and a greater judicial impact on the outcomes of the legislative process. A wide range of viewpoints as to which option the Court should exercise is expressed by constitutional law scholars.

A. *Arguments for Serious Review under the Rational Basis Standard*

One view of the scope of the equal protection and due process clauses taken together is that they are designed both to limit the manner in which the legislative process works and to authorize judicial review of the outcomes of that process. Professor Tribe states that the Court has "never wholly abandoned the position that legislatures, at least in their regulatory capacity, must always act in furtherance of public goals

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[105] Dorrough v. Estelle, 497 F.2d 1007, 1011 (5th Cir. 1974), *rev'd*, 420 U.S. 534 (1975).

transcending the shifting summation of private interests through the political process."[106] Further, he states that courts cannot and should not escape the burden of examining the outcomes of the process in order to determine its reasonableness, even though they must often make "difficult substantive choices among competing values, and indeed among inevitably controverted political, social, and moral conceptions."[107]

The first careful articulation of this point of view came in the context of equal protection in Professors Tussman and tenBroek's pioneering article of two decades ago.[108] They noted that one theory of legislation was the pressure group theory, which states that the legislature is "simply the focal point of competing forces—a social barometer faithfully registering pressures" and hence courts cannot demand that the legislators ignore such pressures.[109] However, they concluded that the constitutional requirement of equal protection "rests upon a theory of legislation quite distinct from that of pressure groups—a theory which puts forward some conception of a 'general good' as the 'legitimate public purpose' at which legislation must aim, and according to which the triumph of private or group pressure marks the corruption of the legislative process."[110] They continued by asserting that the equal protection clause demands of the "conscientious legislator" that "as he promulgates laws, the classifications he creates be reasonably related to the purpose of the law," and that he guard himself "against favoritism or inequality of purpose" and impose special burdens or confer special benefits "only because of their contribution to the general good."[111]

Professors Tussman and tenBroek then asserted that courts, in reviewing legislation, were required by equal protection both to identify the purpose of legislation and to determine the actual relationship between the classification and that purpose. In determining this relationship, the court must,

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[106] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 451 (1978).

[107] *Id.* at 452.

[108] Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

[109] *Id.* at 350.

[110] *Id.*

[111] *Id.* at 365.

if it is to apply the Constitution at all, evaluate all of the evidence available, that is reconsider the same issues considered by the legislature to determine what relation in fact exists.[112]

In a more recent formulation of the approach taken by Tussman and tenBroek, Tribe conveys a strong note of disdain for the legislative process.[113] He criticizes the Court's opinion in *Ferguson* v. *Skrupa*[114] because it "almost appeared to treat pure political interest-balancing and log-rolling compromise as normatively acceptable" and as lending "credence to the notion that the legislative process should be completely willful and self-controlled, with absolutely no judicial interference except where constitutional provisions much more explicit than due process were in jeopardy."[115] He asserts that the Court might have accepted "the pluralist philosophy that no public interest exists beyond the log-rolling result of the legislative process, so that one could not scrutinize legislative choices according to any ascertainable standard of the public good beyond knowing that the political bargaining process was in working order."[116] But, he states that Supreme Court decisions have "wisely resisted the first, or pluralist approach, one that has been criticized as giving undeserved weight to highly organized wealthy interest groups, and as tending to 'drain politics of its moral and intellectual content.' "[117]

In discussing his "Model of Equal Protection" Tribe asserts that the equal protection clause requires "some rationality" in the nature of the classes singled out for special treatment and that the rational relation standard "assumes that all legislation must have a legitimate public purpose or set of

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[112] *Id.* at 365-68.

[113] L. TRIBE, *supra* note 106, at 450-55.

[114] 372 U.S. 726 (1963).

[115] L. TRIBE, *supra* note 106, at 451.

[116] *Id.* at 451-52.

[117] *Id.* at 452. Tribe's conception of a model for the legislative process may be suggested by his reference on page 20 of his book to H. KARIEL, THE DECLINE OF AMERICAN PLURALISM (1969) as support for his rejection of the pluralist approach. Kariel urges a movement towards a parliamentary system of government in which the role of Congress is "to criticize and publicize the work carried on under the great authority of the President." He adds that the members of Congress should be able "to deal with general policy and to escape the choking hold of local constituents." *Id.* at 288.

purposes based on some conception of the general good."[118] In his view, judicial review for rationality requires courts to identify purposes which can be said to advance the general good and then to examine the extent to which the particular classification can be said to advance such purposes. Tribe also asserts that this rational and logical approach to formulating public policy is mandated by the equal protection clause. He writes:

> The ideal of law as the expression of the general public good stands in sharp opposition to the pluralist notion that law aspires merely to satisfy the preferences of ad hoc interest groups. Whether or not judicially enforced, this ideal of law as rationally embodying a shared social vision may serve to broaden the perceived responsibilities of lawmakers and administrators in fulfilling their constitutional oaths.[119]

Two common points may be found in the Tussman and tenBroek article and in the Tribe treatise. First, the authors have no apparent doubts that conscientious legislators and judges can, if they only inquire, identify the general public good and measure the extent to which particular policies serve that good. In Tribe's terms, it is possible to discover by intellectual endeavors whether any particular law is one "rationally embodying a shared social vision." Second, they criticize the performance of the Supreme Court as going too far in deferring to legislative judgments. They agree that the courts cannot avoid the "burdens of substantive judgment" in every case on all of the issues presented to them.

Other commentators take a more modest approach to the role of the courts, but still envision them as having some impact on the legislative process. Professor Gunther[120] approved of what he saw as a move by the Court to the use of a model which would place the burden to articulate the purposes served by the statute on the state, and then confine the Court's review to determining whether or not the particular regulation sufficiently served those purposes. Under this

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[118] L. TRIBE, *supra* note 106, at 995.

[119] *Id.* at 999.

[120] Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

model it would apparently not examine the merits of the state purpose nor balance the merits against any interests being burdened by the legislative classifications on the theory that the people can have their say as to such value choices in the public forum and at the ballot box. Scrutiny of the means adopted by the legislature to serve those goals, however, "would directly promote public consideration of the benefits assertedly sought by the proposed legislation; indirectly, it would stimulate fuller political examination, in relation to those benefits, of the costs that would be incurred if the proposed means were adopted."[121] Gunther's view, like that of Tussman and tenBroek and Tribe, is based on a model of the political process in which goals are articulated and defended and then the most expeditious means for achieving them is sought — an essentially rational process.

A somewhat different approach is taken in an exhaustive student note in a recent issue of the *Michigan Law Review*.[122] The note suggests that the equal protection clause not be read as requiring legislatures to proceed according to any particular standard and as permitting them to use any procedures they regard as appropriate. However, the note asserts, the *outcomes* of the legislative process should be tested by the courts for rationality. The note proposes that the courts use an elaborate tripartite analysis of legislation challenged under the equal protection clause, an analysis which would require extensive judicial reevaluation of the legislative judgment in a wide range of cases.[123] First, courts should judge each classification "according to a legitimate goal, and not simply a *possibly* legitimate goal."[124] Second, they should examine the relationship between the classification and the goal applying at least a "minimum rationality constraint, namely, that the burdened (or benefitted) class pose a higher social harm (or need), be less costly to apply the burden (or benefit) to, or

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[121] *Id.* at 44.

[122] Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771 (1978).

[123] The magnitude of the judicial task elaborated by the authors is shown by the fact that it takes them 120 pages with 443 footnotes and many diagrams to explain how courts should apply the rational basis test.

[124] *See* Note, *supra* note 122, at 774.

have less of an interest in avoiding the burden (or obtaining the benefit) than a class not picked out for special treatment."[125] Third, the courts should subject the law to a balancing test. "The court should initially ponder whether the differential in harm between the burdened and unburdened is great enough to justify the differential treatment in light of the significance of the personal and governmental interests, the severity of the burden, and the extent to which the governmental interest is served."[126] In so doing, the courts "should proceed to examine 'reasonable,' less restrictive alternatives, where reasonableness is judged according to the prima facie fairness of the law, the social costs of the alternative, and how much less restrictive the alternative is."[127]

B. *Arguments Against Serious Review under the Rational Basis Standard*

Some commentators take a quite different view of the legislative process and of the role of the courts in reviewing its outcomes. Professer Posner, for example, attacks the theory that the legislative process is one of attempting to ascertain the public interest and pass legislation seeking to advance that interest, as lacking "a good analytical basis" and being "contrary to actual experience with governmental policies and programs."[128] He, too, takes a cynical view of the legislative process contending that public policies supposedly supporting legislation are simply the product of the financial and organizational abilities of special interest groups rather than the result of true consideration of the public interest.[129] Instead, it "would be seen to consist of discrimination, in the sense of an effort to redistribute wealth (in one form or another) from one group in the community to another, founded on the superior ability of one group to manipulate the political process rather

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[125] *Id.*

[126] *Id.* at 777.

[127] *Id.*

[128] Posner, *The DeFunis Case and the Constitutionalty of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 27.

[129] *Id.*

than on any principle of justice or efficiency."[130]

Posner's cynicism about the legislative process does not, however, lead him to suggest judicial review. He concludes:

> If it is true that we have a government of powers and interests rather than of general-welfare maximization, and if this pattern is an inevitiable, and perhaps ultimately a desirable, feature of our society (the impartial pursuit of the public interest might incite a revolution by those disadvantaged in that pursuit), then it would be a mistake to require that legislation, to withstand a challenge based on alleged arbitrariness or discrimination, be reasonably related to some general social goal. The real 'justification' for most legislation is simply that it is the product of the constitutionally created political process of our society.[131]

A more elaborate response to the theories which assert that the Constitution commands legislative outcomes which are rationally related to the public good is contained in Justice Linde's article on "Due Process of Lawmaking."[132] He argues that the constitutional commands of due process and equal protection are directed to the legislatures, not the courts, and that it is therefore inappropriate for courts to require legislation to meet standards for which the legislative process is inappropriate. He urges that the proper role of the courts is to police the structural and procedural limitations which the Constitution puts on the legislative process, in other words to enforce "due process of lawmaking," but not to scrutinize the outcomes for reasonableness. Linde's view is that, except for those constitutional provisions which place substantive limits on legislative outcomes by extending special protection to interests against the legislative process, "the reach and limits of otherwise valid laws are assumed to have adequate explanations in whatever combination of policies

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[130] *Id.* at 27-28.

[131] *Id.* at 28-29. *See also* O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U.L. REV. 19 (1979). "The role of the legislature in this scheme is to sit as a grand and rough utilitarian counting house, an institutionalized calculator of interests, that attempts to determine and implement the preferences of its constituents in the best way it can." *Id.* at 38.

[132] Linde, *supra* note 5. The brief summary given in the text does not do justice to Justice Linde's elaborately developed thesis.

caused them to take the shape they did."[133]

Linde concludes that our various constitutions provide:

> a blueprint for the due process of deliberative, democratically accountable government, with fifty statewide and numberless local variations. . . . Our institutions and procedures are designed to curb power to make law capriciously, on merely personal or inarticulate impulse, without preventing the enactment of measures that can win deliberate assent, even though they cater to a selfish minority, even if they are doubtful means toward divergent goals.[134]

He adds, of course, that the interests which the Constitution can fairly be said to protect may be shielded by the courts from unduly burdensome outcomes of this legislative process.

In a recent book review,[135] Professor Nagel challenges the basic assumptions of the rationalist approach to constitutional adjudication which permeates Tribe's book.[136] Nagel refers to the "effort to establish a virtuous social order by the force of intelligence, exercised by an elite of lawyer-philosophers" and to "lawyers, judges, and scholars who are busily engaged in exercising and rationalizing their own disproportionate influence on the nation's affairs"[137] He notes: "Judges, law clerks, litigants' lawyers and law professors are usually isolated from, and often ignorant of, many of the realities of the political process, yet they exert enormous influence over public policy."[138]

Nagel asserts that constitutional rationalism "tends to denigrate important values and severely limits the usefulness of the legislative process."[139] He points out that it disfavors policies not asserted to independently further articulated values; policies based on tradition; policies that have complex or vague objectives; policies that are justified after implementa-

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[133] *Id.* at 203.

[134] *Id.* at 253.

[135] Nagel, *supra* note 15.

[136] *Id.* at 1177.

[137] *Id.*

[138] *Id.* at 1194.

[139] *Id.* at 1184. Nagel's summary of the reasons why "an unconfined demand for rationalism in government is not desirable or realistic in a democracy" is provocative and useful. *Id.* at 1184-94.

tion; and policies without empirical validation. He notes that many democratic values are served by legislative "irrationality."[140] Notable among these is the ability to accommodate a variety of interests at once, to act without complete predictability as to consequences, and to experiment with possible solutions while retaining the ability to change if they fail to work. He concludes: "The legislative process need not be romanticized. It works imperfectly and looks worse. But attempts to evaluate the integrity of the legislative process and its products by the unconstrained standards of constitutional rationalism threaten to sacrifice much of the usefulness that legislatures offer democracy."[141]

CONCLUSION

Which set of advisers should the Court heed? This author's conclusion is that it should listen to the Posners, Lindes and Nagels and that challenges to ordinary legislative classifications under the rational basis standard will be rejected. The idea that legislation must be shown to be rationally related to some public purpose which serves the general good is based on a totally unrealistic view of the legislative process as it functions in the United States. A serious attempt by the Court to force legislatures to adopt the rational basis model would undermine the foundations of our democratic system under which public policy is determined through the legislative process.[142]

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[140] He prefaces this discussion with the following statement: "Compared to the detached, careful evaluation of briefs and evidence in light of an explicit, consistent set of legal values that is the ideal of the judicial process, the legislative process is a nightmare of irrational decision making." *Id.* at 1192.

[141] *Id.* at 1193.

[142] For an elaborate argument that we already have done violence to the foundations of the Constitution by shifting so much of decision-making from legislatures to the executive, see E. HAEFELE, REPRESENTATIVE GOVERNMENT AND ENVIRONMENTAL MANAGEMENT (1973). He argues that important public policy decisions "must be put back into a legislative context, where bargaining, vote trading, and accommodation across a broad range of issues can shape policies as the founders meant them to be shaped." *Id.* at vi. His arguments appear equally applicable to attempts to shift decision-making to courts.

For an assertion that the courts are not determining relationships between classifications and objectives but instead are making basic policy decisions, see Note, *Leg-*

In our complex societies, issues cannot be sorted out in accordance with the simple judicial model. The basic problem is that of identifying what is in the public interest. At a sufficient level of abstraction there is no difficulty. Everyone can agree that clean air or bountiful supplies of energy or traffic safety are desirable and achieving such goals is in the public interest. But the real problems which face legislatures daily are much more intractable. For example, in approaching the problem of providing clean air, any regulation designed to achieve that objective imposes costs. They may take the form of tax dollars or of increasing financial burdens on enterprises which contribute to air pollution or of reductions in the energy supplies available because certain kinds of generating facilities contribute to air pollution. Immediately the question becomes not the simple one of the desirability of clean air but the more complex one of how much clean air at what social cost. The answer to that question is far from evident and hardly subject to rational analysis, yet it is only the beginning of the complexities. The next question is the more difficult one of distributing the costs of the benefits and burdens. Not everyone will get the same improvement in air quality. Even worse, the burdens will not be distributed equally, or even in relation to the benefits. As to workers in certain industries, the question may appear as a choice between employment and cleaner air. Other industries will face increased costs which will be passed on to the consumers of their products making a choice for some between more expensive goods or cleaner air. To others it may appear as a choice between cleaner air and ample heating oil for the winter season. Truckers will insist that the major burdens should be placed on passenger cars

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islative Purpose, Rationality, and Equal Protection, 82 YALE L.J. 123, 154 (1972):

> Because the disputes that arise under the rubric of the Equal Protection Clause have to do with the relative merits of competing public policies, judicial decisions obscure the central issues in such cases to the extent that they are based on discussions of a statute's rationality. The nature of the conflict between the political values at stake as well as the underlying bases of judicial reasoning would be made more explicit if the competing public policies were weighed outright without diversionary discussions regarding a statute's rationality.

Id.

and vice versa. Taxpayers will assert that the program is too costly and should be scaled down.[143]

In this process it is difficult enough to answer the general question of what ratio of costs to benefits serves the public interest. But the question of distributing those costs and benefits inevitably produces legislation which makes various exceptions and differentially distributes burdens. These classifications, however, will not appear to be rationally related to the goal of cleaner air. The decision to place larger burdens on industry than on agriculture, or to exempt power plants from certain burdens imposed on other industries, or to permit oil refineries to emit higher levels of pollutants in the interest of increasing gasoline production, will appear irrational if the problem is conceived of as simply imposing burdens for the purpose of getting the maximum amount of clean air.[144]

The point is that the issues cannot be addressed in terms of rational analysis and no one can know what balance of interests best serves the public interest. No president, governor, legislator, lawyer, or judge has any special talent which en-

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[143] For a much more elegant and detailed discussion of the problems suggested in this paragraph, see E. HAEFELE, *supra* note 142, especially at 63-87. He states:

> How are we to decide how much environmental quality we are to have? One obvious answer is, as much as we are willing to pay for. But how are we to determine that if we cannot divide it up and price it in individual, separate packages? Moreover, since many different bundles of environmental quality might cost the same amount but have far different patterns in the distribution of the costs and benefits, how are we to distinguish one bundle from another? And if you view motorboating as recreation and I view it as noise pollution, how are we going to decide simple inclusion and exclusion in our definition of environmental quality?

Id. at 64.

[144] Of course, the problem may be viewed simply as one of narrowing the statement of the legislative purpose in order to make the classifications appear more rational. Proceeding very far down that path, however, can eliminate the whole basis for review under the rational basis standard. As has been well demonstrated, "[i]t is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it." Note, *supra* note 142, at 128. How, among other things, should the courts deal with a statute which explicitly asserts as its purpose securing as much clean air as is possible without significantly increasing the costs or decreasing the output of farms and electrical generating facilities and makes exemptions from its restrictions for farms and power plants? *See also* Sandelow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 658-60 (1975).

ables him or her to answer that question. Instead, our democratic system provides a process for the resolution of such issues, and it is the outcome of that process which, by definition, serves the public interest. The virtue of our legislative system is that it provides a setting in which all of the varied interests can bring their points of view to bear and engage in a process of bargaining and haggling within which multiple goals can be served and compromises attained which are tolerable to the public at large. Only an untidy, free process which is capable of making "deals" and accommodating groups can carry out this process successfully.[145]

In short, it is contrary to the basic premises of our constitutionally mandated legislative system for the courts to use the general clauses of the constitution to impose on that system a mandate of rationalism which will be enforced by courts and lawyers. Courts have a role in assuring that the legislatures function within the structural and procedural boundaries set by the constitution, but beyond that it would seem that the basic presupposition of our system is that whatever emerges from the legislative process serves the public interest.

Of course, the legislative process is not perfect. Changes are constantly being made through the normal political processes and doubtless more would be useful to minimize those procedures which remove the real decision-making from the legislatures to the executive or other "non-political" groups.[146] But the use by courts of judicial review to push for legislative processes which are more "rational" and "efficient" can serve only to distort further the political processes which now have substantial capacity to absorb and consider the wide range of interests relevant to legislative policy-making.

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[145] For an elaborate argument that decision-making "through mutual adjustment" is a better method than any form of centrally regulated coordination "for calculated, reasonable, rational, intelligent, wise . . . policy making," see C. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY 294 (1965).

[146] For a discussion of ways by which decisions which have been shifted away from legislatures might be returned, see E. HAEFELE, *supra* note 142, at 9-13.